NO. 50083-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE ARNOLD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

TABLE OF AUTHORITIES – cont'd

Page

TABLE OF AUTHORITIES – cont'd

Page

TABLE OF AUTHORITIES – cont'd

Page

FEDERAL CASES:

TABLE OF AUTHORITIES – cont'd

Page

STATUTES, RULES AND OTHER AUTHORITY:

A. ASSIGNMENTS OF ERROR

1. Michael Arnold was denied his state and federal constitutional rights to a jury trial and due process of law by the improper admission of expert testimony: (1) that in 95% of cases of sexual abuse disclosure is delayed; (2) that the closer the relationship between alleged perpetrator and alleged victim the longer the delay, and (3) that the reasons for delay in reporting in cases involving family relationships are the alleged victim's fear for the perpetrator, the family or himself or herself.

2. The prosecutor's misconduct in arguing in closing and in the closing PowerPoint presentation -- that the only two possibilities were either that the alleged victims were telling the truth or that they had made up their allegations themselves -- denied Mr. Arnold his state and federal constitutional rights to the presumption of innocence, to a correct statement of the burden of proof and to due process of law.

3. The trial court's Instruction No. 17, which told the jury that "in order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of credibility," commented on the evidence in violation of Article 4, section 16 of the Washington Constitution.

4. Cumulative error denied Mr. Arnold a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the admission of improper expert testimony: (1) that in 95% of cases of sexual abuse disclosure is delayed; (2) that the closer the relationship between alleged perpetrator and alleged victim the longer the delay, and (3) that the reasons for delay in reporting in cases involving family relationships are the alleged victim's fear for the perpetrator, the family or himself or herself, deny Michael Arnold his right to a jury trial and due process of law where the expert's testimony was not based on any scientific theory or meaningful empirical data, was too general to be relevant and constituted improper vouching for the credibility of the complaining witnesses?

2. Did the prosecutor's misconduct in arguing to the jury through his PowerPoint presentation and orally in closing argument -- that the only two possibilities were that the alleged victims were either telling the truth or made up the accusations on their own -- misstate the burden of proof and deny Mr. Arnold the presumption of innocence and due process of law where this argument was essentially an argument that to acquit the jury had to find that the victim-witnesses were lying?

3. Did the trial court's non-corroboration instruction unconstitutionally comment on the evidence under Article 4, section 16

where, under the facts of the case, telling the jurors that they could convict even if the alleged victim's accusations were uncorroborated, was the same as telling them that the alleged victims' statements alone were sufficient for conviction?

4, Do the cumulative impact of the errors in Mr. Arnold's case require reversal?

C. STATEMENT OF THE CASE

1. Procedural history

The Pierce County Prosecutor's Office charged appellant Michael Arnold with six counts of first degree child molestation, three counts involving his sister Sarah and three counts involving his sister Caitlin; all counts included domestic violence allegations based on their sibling relationships. CP 3-6. Count VI, one of the counts involving Caitlin, was dismissed by the prosecution after the evidence at trial failed to support it. CP 99-101; RP 225.[1]

The jury convicted on only two of the remaining five counts, Counts IV and V, involving Caitlin, and were unable to agree on verdicts for any of the counts involving Sarah, Counts I, II and III. CP 102-107. The parties subsequently resolved Counts I-III by a guilty plea to one

[1] The verbatim report of proceedings is in eight consecutively-numbered volumes designated "RP."

count of assault in the third degree, in which Mr. Arnold did not admit guilt. CP 154, 155-164, 183-184; RP 376-377.

On December 16, 2016, the Honorable Kathryn J. Nelson imposed judgment and sentence with a term of 84 month – 7 years -- for Michael's having had his younger sister touch his penis on two occasions when he was a teenager.[2] CP183-184. At sentencing, the prosecutor noted that the sentence was not indeterminate because Mr. Arnold may have been a juvenile at the time of the incidents. RP 382, 384. Mr. Arnold was supported at his sentencing through a number of letters to the court. CP 147-153.

A timely notice of Appeal followed. RP 185-186. The trial court granted an order of indigency for the appeal. CP 187-193, 194-195.

The court subsequently entered an order amending the judgment and sentence to delete a lifetime community custody on Counts IV and V and impose a 36-month term of community custody on these counts instead. CP 196-197.

2. Trial evidence

Michael Arnold is the second from the oldest of the eleven children of the Arnold family who grew up in a four-bedroom home in

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[2] Had Mr. Arnold been charged with incest instead of child molestation, he could have been convicted of no more than a class C felony. RCW 9A.64.020.

University Place, Washington. RP 41-45, 140, 142, 208, 210. Michael's sisters Sarah and Caitlin were the fourth and third from the youngest of the siblings. RP 41-44, 140. At the time of trial, Michael was 30 years old, Sarah was 20 and Caitlin 18. RP 38, 41, 44, 139. The trial, however, involved incidents which allegedly occurred 16 or 17 years earlier, when Michael was a teenager. RP 100.

When they were growing up, the Arnold children slept in two downstairs bedrooms of their split level house, one bedroom for the girls and one for the boys. RP 45-50, 145-148. The children were home schooled as well. RP 54-55, 14. They did not have much personal space; and, although not everyone was around all of the time and they went to the YMCA for sports classes at times, the children had little privacy in their lives. RP 55, 63. The children were not left alone when they were younger; there were always older children around. RP 157.

Although some of the children left home as they grew older, they often returned to live again in the family home. RP 48, 60-61, 67-6974, 81-82.

Typically Friday nights were movie nights at the Arnold house, when the children were allowed to watch movies and sleep on the couches of what they called the downstairs living room. RP 56-60.

Sarah testified at trial that on three occasions when she was 4 or 5 years old and spending the night watching movies, Michael touched her on her vagina underneath her underwear; she was wearing a nightgown on at least two of these occasions. RP 83-89, 100. Sarah said, the first time, she was sleeping on a big round couch in the downstairs living room and awoke when she felt Michael touch her. RP 82-84. She said he had a flashlight with him. RP 84. When she woke, he ran back to the boys' bedroom at the end of the hall. RP 85. Sarah described the second and third incidents as being much like the first. RP 85-87. The third time she awoke, however, only because the flashlight was shining in her face; on that third occasion she could not remember if the touching was over or under her clothing or whether she was wearing a nightgown. RP 87. After the third time, Sarah said she stopped wearing nightgowns and slept in pajamas. RP 90.

She testified that she did not tell anyone about the touching because she was afraid of Michael; he had been physically abusive to her in disciplining her, but she did not recall him saying anything to her at the time of the incidents about not telling.[3] RP 92. Sarah talked to Caitlin

[3] Sarah's examples of Michael's mistreatment of her included picking her up and throwing her against the wall and swinging her off the top of the bunk bed to the bottom bunk so that she hit against a dresser. RP 116-117. He made her knock before coming into the bathroom. RP 118-119. She

when Sarah was 11 or 12 and Caitlin 8 or 9; she thought Caitlin was in a lot of distress at that time and she got Caitlin to agree, when she questioned her about why she was upset, that Michael had "done something" to her. RP 93. Sarah then told Caitlin that something had happened to her too. RP 93.

The second time Sarah made allegations against Michael was in 2014 when she told her cousin Jodie; this was a week and a half after Caitlin disclosed to Jodie that Michael allegedly had improper sexual contact with her. RP 94-95, 97. The police were contacted in response to Caitlin's claims. RP 94-96. The police, however, did not speak to Sarah until a year later. RP 83. Sarah initially told the police then that an older brother and two older sisters were in the room at the time of the incidents. RP 102-104.

Caitlin and Sarah were living with Jodie and her husband David when they made these allegations about Michael. RP 144-145. Michael was living in the family house then, as was the oldest Arnold sibling Jamie, her husband and five children. RP 96. Sarah testified that she thought that if she reported abuse that might help if Michael tried to abuse someone else. RP 96.

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recalled, as well, a time when Michael got angry with her for turning up the heat when she was practicing her flute. RP 118.

When nothing happened initially after the reports of abuse to the police, Sarah tried unsuccessfully to get a restraining order against Michael. RP 98-99. 119.

Caitlin testified that when she was 2, 3, 4 or 5, she remembered sitting on the floor in the boy's bedroom watching television when Michael displayed himself and asked her to touch his penis. RP 169-170. She said that it got harder when she touched it. RP 170. She could not remember how long she touched him or why she stopped. RP 170. She testified that it happened again when she was outside with Michael and her brother Josh; she was learning to ride a bike. RP 171. According to Caitlin, Michael asked her to go inside to his room; he tried to give her candy. RP 172. He had her touch his penis again with her hand. RP 173. He threatened her; she was not sure when, but believed it was after this. RP 173-174. On another occasion she had to get up in the night to go to the bathroom; Michael was awake and went in with her. RP 174. He made her get undressed. RP 174. Caitlin could not recall what happened or if Michael took his clothes off.[4] RP 176.

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[4] In contradiction to her trial testimony, Caitlin, as set forth in the Declaration for Determination of Probable Cause, apparently told the police initially that Mr. Arnold touched her when he had her get undressed. CP 1-2.

Caitlin also testified about at time when she was 11 or 12 years old and upstairs watching Netflix on the computer and Michael asked her if she remembered what he had done to her. RP 177-178. She told him she did not remember. RP 178. According to Caitlin, he said he remembered being in his room playing Mario Kart; he said he was sorry and asked her to forgive him. RP 178-179. Michael did not say he was apologizing for having her touch his penis. RP 198.

Michael was physically abusive, Caitlin said, more when they were younger, although he was sometimes verbally abusive when they were older. RP 202.

Caitlin testified that she said something to Sarah when she was 11 or 12, but did not say anything to her parents. RP 180. Caitlin told Jodie in 2014 after Michael had been living in the house again. RP 181. Jodie told her to tell her parents and ultimately Caitlin spoke to the police. RP 181.

The children's mother, Kimberly Arnold, confirmed the ages of the children, their living arrangements, home schooling and sports classes, and the fact that Sarah and Caitlin had made disclosures about Michael to the police. RP 207-211, 213-216.

Ryan Johnson confirmed that he was the Pierce County Sheriff's patrol deputy who came to Jodie Holman's house in November and

December 2014, after Caitlin and Sarah told Jodie that they had been molested many years earlier. RP 227-234. Deputy Johnson never met Michael Arnold, nor had any further contact with anyone involved in the case. RP 239. He was permitted to testify that Michael was identified as the brother who she claimed touched her. RP 234-236.

Pierce County Sheriff Detective Gary Sanders similarly testified he interviewed Caitlin and Sarah Arnold about their allegations; Caitlin in November 2014, and Sarah in December 2015. RP 270-273. He also testified that Sarah made allegations against her brother Michael. RP 274.

Keri Arnold, a child interviewer for the Pierce County Prosecutor's office, who was unrelated to the Arnold family and who knew nothing about the case -- nothing about the specific allegations, when the incidents were alleged to have occurred or to have been disclosed, or the manner of disclosure -- testified as a state's expert witness on memory and delayed disclosure. RP 249-251. Keri Arnold testified that she had no special training in "delayed disclosure," but that it was a topic that came up at training and conferences. RP 243. Based on this, she testified that in at least 95% of cases or more, there is a delay in reporting, "frequently of at least days, and generally weeks, months or years." RP 244. She testified it is most frequently a delay of months or years, depending – in some degree – on the relationship between the alleged victim and the alleged

perpetrator. RP 244. According to Keri Arnold the closer the relationship is -- a close family member or family friend -- the more likely the alleged victim is to delay disclosure. RP 244. She testified that fear causes the delay – fear of what will happen to the perpetrator, the family or them. RP 245.

Keri Arnold also testified that "episodic memory" refers to being able to recall specifics of the incident and to provide more detail, where scripted memory sounds generic because it has happened a lot. RP 246. She also testified that disclosure is a process and not an event, such that a person may disclose additional events and provide more detail over time.[5]

3. Objection to jury instruction

Defense counsel objected to the court's giving of the state's proposed instruction:

> In order to convict a person of child molestation in the first degree, as defined in these instructions, *it shall not be necessary that the testimony of the alleged victim be corroborated*. The jury is to decide all questions of credibility.

RP 257-260 (emphasis added). Defense counsel argued that this instruction was not necessary, given the instruction on direct and circumstantial evidence, and that it placed undue emphasis on the fact that

[5] Caitlin told less as time went by. CP 1-2.

corroboration is not necessary and improperly highlighted that an alleged victim's testimony alone is enough for conviction. RP 258-260.

The court gave the instruction, Court's Instruction 17. CP 108-138; RP 260.

4. Closing arguments and the prosecutor's PowerPoint presentation.

a. PowerPoint

The prosecutor's PowerPoint slides included a series of slides proclaiming and developing the theme that there were only two possibilities in the case:

POSSIBILITIES

1. S.A. and C.A. are telling the truth

2. S.A. and C.A. made it up on their own

CP 75-98. The presentation continued with a slide titled, "Why do people lie?," with the possibilities "to get THEMSELVES out of trouble or to make themselves look good," but that "Allegations of abuse do neither" because "attention is negative. Criminal justice process is uncomfortable at best." CP 75-98. This slide was followed by a slide saying, "No evidence to collude [sic] a sinister plot against their brother," and a slide

saying "No credible evidence to support the conclusion they made it up on their own. The slide series ended:

> The only conclusion supported by the
> EVIDENCE is that they are telling
> the TRUTH
> about being touched (S.A.) or
> touching him (C.A.).

CP 75-98. On a slide with the title "Abiding belief in the truth of the charges," there are three bullet points, including "No reasonable argument the abuse didn't occur." CP 75-98.

b. Prosecutor's closing

The prosecutor's verbal argument followed the theme that there were only two possibilities, Sarah and Caitlin were "making the whole thing up" or "telling the truth" (RP 293-294), and that they had no reason to lie. RP 294. The prosecutor argued: Why would Caitlin make it up? What reason other than it really happened? RP 302. They aren't making this up. RP 303. There is no evidence that they colluded in a sinister plot. RP 306.

The prosecutor used Keri Arnold's testimony to support the arguments that delayed disclosure is common and that Caitlin's reasons for not telling for 16 years were valid. RP 302-303. The prosecutor

argued that credibility is not reduced by the long delay because disclosure was delayed in 95% of the cases which Keri Arnold saw, a phenomenon which the prosecutor described as choosing to push down the events and not say anything because of fear. RP 308-309.

c. Defense closing

Defense counsel disagreed with the "conclusions and assumptions" of the prosecutor; counsel noted, in particular, that while corroboration is not mandatory, this does not automatically mean that the statements are truthful. RP 311-312. Counsel noted that there was no physical or forensic evidence, just allegations that something had happened fifteen years earlier. RP 314.

Counsel pointed out that the fact that Michael moved back into the house and had not been the nicest of brothers could provide a motive to lie, or perhaps they misremembered another event or an event involving someone else or incorrectly remembered an incident. RP 319-321. In spite of the fact that Sarah and Caitlin might now believe something happened when they were 4 years old, counsel argued, they might have been confused or misremembered what happened many years earlier. RP 324-325.

d. The prosecutor's rebuttal closing

In rebuttal the prosecutor argued that the jurors should not consider the possibilities, other than lying, enumerated by defense counsel because there was nothing in evidence to support them. RP 327-328.

D. ARGUMENT

1. MICHAEL ARNOLD WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW BY THE IMPROPER ADMISSION OF EXPERT TESTIMONY: (1) THAT IN 95% OF CASES OF SEXUAL ABUSE DISCLOSURE IS DELAYED, (2) THAT THE CLOSER THE RELATIONSIP BETWEEN PERPETRATOR AND VICTIM THE LONGER THE DELAY, AND (3) THAT THE REASONS FOR DELAY IN REPORTING IN CASES INVOLVING FAMILY RELATIONSHIPS ARE FEAR FOR THE PERETRATOR OR THE FAMILY OR THE VICTIM'S FEAR FOR HIMSELF.

The testimony of Keri Arnold, a child interviewer from the Pierce County Prosecutor's office, that 95% of disclosures of child abuse are "delayed disclosures" her testimony that the closer the relationship between an alleged abuser and an alleged victim, the longer the delay; and her testimony that the reasons for delay in the case of a close family relationship are fear of the alleged victim for the perpetrator, the family or themselves was improper. RP 244-245, 249.

Ms. Arnold's testimony about delayed disclosure was not shown to be based on any legitimate scientific theory or meaningful empirical data,

and improperly vouched for the credibility of Sarah and Caitlin; it denied Mr. Arnold his right to a jury trial and due process of law.

Ms. Arnold candidly admitted that she had no training in delayed disclosure and that she was relying on apparently informal discussions of the subject at training and conferences. RP 243. And, in any event, she had no scientific theory of delayed disclosure to share with the jury. Instead, she shared a statistic that 95% of disclosures of sex abuse were delayed. Her definition of "delay," however, as being from "at least days" through "weeks, months and years " -- essentially *any* length of time more than a few days – undercut any relevance of the statistic, even if it had a legitimate empirical basis. RP 244. There was no way a juror could know from Keri Arnold's testimony if a 15-or16- year delay was common or uncommon or what percent of cases had such long delays. RP 244. A 15-year delay could occur in less than one percent of all cases involving allegations of sex abuse and still be counted as within the 95% of cases where allegation of sex abuse was delayed for at least a few days.

In fact, the only purpose of Keri Arnold's testimony was to reassure the jurors that Sarah's and Caitlin's testimony was credible in spite of their 15-to-16-year delay in making claims against Mr. Arnold. The prosecutor used it for this purpose in telling the jurors that there was no reason to find Sarah or Caitlin less credible because of their delay in

disclosing, because there was delayed disclosure in 95% of sex abuse cases. RP 308-309.

Sarah's and Caitlin's disclosures were credible, the prosecutor was able to argue, because they shared the characteristic of delay with 95% of sexual abuse cases, and that their delay was credible because of the family relationship. The family relationship, according to Ms. Arnold, provided valid reasons for delay. This testimony denied Mr. Arnold his state and federal constitutional rights to due process and to a jury trial. .

A prosecutor must not ask a state's witness to comment on the credibility of another witness. United States v. Alcantara-Castillo, 788 F.3d 1156, 1197 (9th Cir. 2015); United States v. Harding, 585 F.3d 1155, 1158 (9th Cir. 2009). Such testimony invades the province of the jury and denies the accused due process of law. Id. (citing United States v. Sanchez, 176 F.3d 1214, 1219 (9th Cir. 1999)). It is for the jury alone to determine the credibility of a witness's testimony. United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005).

Washington authority is the same as federal law on this point: a witness may not express an opinion on another witness's credibility nor be asked to render an opinion as to the guilt or innocence of the accused. ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v.

Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 505 (2007). Such testimony invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby, 144 Wn.2d at 617. It is improper whether it directly or indirectly implies the witness is telling the truth. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (credibility of witnesses is a jury question), State v. Carlton, 80 Wn. App. 116, 129, 906 P.2d 999 (1999) ("no witness may give an opinion on another witness's credibility").

An improper comment can constitute a manifest constitutional error which can be raised for the first time on appeal even where, as here, it is not objected to at trial. Thach, at 312.

. Ms. Arnold's testimony was akin to the testimony in State v. Black, supra, and cases cited in Black, in which so-called experts provided opinion testimony on guilt and credibility and committed reversible error. In Black, the error was in admitting testimony about "rape trauma syndrome." In State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983), the error was in admitting testimony about the characteristics of sexually abused children; and in State v. Stewart, 34 Wn. App. 221, 222-

224, 660 P.2d 278 (1983), the error was in admitting testimony about the propensity of babysitting boyfriends to inflict child abuse.

In considering whether opinion testimony is unfairly prejudicial, appellate courts consider "(1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) other evidence before the trier of fact." State v. Kirkman, 159 Wn.2d 918, 928, 156 P.3d 125 (2007) (citing Demery at 759).

Here, consideration of these factors establishes that the testimony was impermissibly prejudicial. There was no evidence of guilt except the statements of Sarah and Caitlin about something that supposedly had happened many years earlier – statements which were almost impossible to rebut or challenge given the lapse of time. Even though the Arnold family is large and there was little privacy in the house, none of the family members were called by the state at trial to shed light on the allegations. Instead, Ms. Keri Arnold appeared as an expert to testify that the sisters were credible; her testimony supported the trial prosecutor's argument that the delay not only did not detract from their credibility but made them more credible. It put them in a category with the overwhelming majority of sex-abuse disclosers; it fit a pattern of disclosure of sex abuse among family members. Ms. Arnold provided reasons, which she described as valid, why Sarah and Caitlin delayed disclosure. Given the absence of

other evidence at trial and the difficulty of presenting a defense under the circumstances, the testimony could hardly have been more prejudicial. Given the doubts the jury entertained about the state's evidence, Ms. Arnold's testimony likely influenced the jury verdict on the counts they convicted Mr. Arnold for.

Mr. Arnold should be entitled to a new trial without the improper testimony of Keri Arnold.

2. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENTS AND THE POWERPOINT PRESENTATION FOR CLOSING ARGUMENTS -- THAT THE ONLY TWO POSSIBILITIES WERE THAT THE ALLEGED VICTIMS WERE TELLING THE TRUTH OR MADE UP THE ACCUSATIONS ON THEIR OWN -- DENIED MR. ARNOLD HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, A CORRECT STATEMENT OF THE BURDEN OF PROOF AND DUE PROCESS OF LAW.

The prosecutor's PowerPoint presentation, shown during closing argument, focused on the false premise that there were only two possibilities: Sarah and Caitlin were either telling the truth or they made up their accusations "on their own." CP 75-98. The ensuing slides assert that there is no evidence of a sinister plot and no credible evidence they made up their accusations, and finish with a slide that says the only conclusion supported by the evidence is that they are telling the truth. CP

75-98. A subsequent slide titled "Abiding belief in the truth of the charges" has three bullet points, one of which says "No reasonable argument the abuse didn't occur." CP 75-98. The prosecutor made the same points verbally. RP 293-294, 302-306.

After Mr. Arnold's attorney suggested other possibilities, in the defense closing argument -- a possible motive to falsely accuse Mr. Arnold and that Sarah or Caitlin may have misremembered or confused their memories with events involving someone else (RP 319-321), the prosecutor argued in rebuttal that the jurors should not consider these possibilities or possibilities other than lying because there was no evidence to support them. RP 327-328.

This was improper. As a matter of well-established precedent, a prosecutor commits misconduct when he or she tells jurors that to acquit, they would have to find that the state's witnesses were lying. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); State v. Riley, 69 Wn. App. 349, 353 n.5, 848 P.2d 1288 (1993); State v. Fleming, 83 Wn. App. 209, 313-314, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Such arguments unconstitutionally misstate the law and relieve the state of its burden of proof.

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (citing State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citing In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)), Fifth and Fourteenth Amendments.

As the court noted in Fleming, the jury *had to acquit* unless it had an abiding belief in the testimony of prosecution witnesses:

> The prosecutor's argument misstated the law and misrepresented both the role of the jury and burden of proof. The jury would not have to find D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened . . . it was required to acquit.

Fleming, 83 Wn. App. at 214.

Argument which misstates the burden of proof may be considered manifest constitutional error which can be raised for the first time on appeal. State v. Fleming, 83 Wn. App. at 315-316.

In Fleming, the court reversed even though there was no objection at trial because prosecutor continued to commit this type of misconduct after the appellate courts had clearly identified it as misconduct: "We note that

this improper argument was made over two years after the opinion in Casteneda-Perez, supra. We therefore deem it to be flagrant and ill-intentioned." Id., State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).

In State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), this Court declined to follow Fleming insofar as Fleming required a published decision on an issue before deeming misconduct reversible error:

> Instead, we follow our holding in Venegas [State v. Venegas, 155 Wn. App. 507, 228 P.2d 813 (2010)] that such arguments are flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection. 155 Wn. App at 523 n.16, 525.

Johnson, 158 Wn. App. at 684. The Johnson court explained that even though the trial court's instructions, which the jurors are presumed to have followed, may have minimized the impact of the misconduct in misstating the law on the presumption of innocence, that principal is the "bedrock upon which [our] criminal justice system stands," and misstating it "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Johnson, at 685-686, (citing State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)); In re Glassmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2004) (where the prosecutor's misconduct is flagrant and ill-intentioned and it is unlikely the

prejudice could be cured, failure to object does not waive the issue on appeal).

Here, the prosecutorial misconduct should be reversible error under either Fleming or Johnson. These cases hold that it is well-established misconduct to tell the jurors they had only two choices – to believe Sarah and Caitlin or to find that they were lying. This tells the jurors that if they do not find Sarah and Caitlin were lying, they must find they were telling the truth and find Michael Arnold guilty. It misstates the burden of proof, undermines the presumption of innocence and denies the accused due process and a fair trial.

Further, the error was clearly not harmless. The jurors acquitted on the counts involving Sarah. They may have felt that the fact that she did not make disclosures until after Caitlin disclosed and may have wanted to support Caitlin or the fact that a court denied her protection order application against Mr. Arnold, possibly because it found her claim not credible, provided affirmative evidence in the record from which they could find her untruthful, while no such evidence was available with respect to Caitlin.

The trial took place many years after the alleged incidents occurred. This made it very difficult to convey to the jury what was happening in the family at that time, any of the facts about movie night – what movies were watched, who watched, who was sleeping in the room and where -- or any

outside factors which might have influenced the sisters. The state chose not to have any members of the family testify. What the jury heard relevant to their decisions was the testimony of Sarah and Caitlin and the opinion testimony of Keri Arnold. The misconduct in misstating the burden of proof was overwhelmingly and unfairly prejudicial. The prosecutor was charged with knowing the well-established law and the decision to ignore that law to to get a conviction was flagrant and ill-intentioned and should require the reversal of Mr. Arnold's convictions.

3. THE TRIAL COURT ERRED AND UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE IN GIVING INSTRUCTION NO. 17 WHICH TOLD THE JURORS THAT TO CONVICT MR. ARNOLD OF CHILD MOLESTATION IT WAS NOT NECESSARY THAT THE TESTIMONY OF THE ALLEGED VICTIMS BE CORROBORATED.

Over defense objection the trial court instructed the jury that "[i]n order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide al questions of witness credibility." CP 108-138.

Mr. Arnold is asking this Court to hold that in his case this instruction unconstitutionally commented on the evidence in violation of Article 4, section 16 of the Washington constitution, which provides that "judges shall not charge juries with respect to matter of fact, nor comment

thereon, but shall declare the law." Mr. Arnold wishes also to preserve an issue that the non-corroboration instruction is a comment on the evidence in all cases and should not be given.

Counsel for Mr. Arnold is aware that this instruction has been upheld as not constituting a comment on the evidence. State v. Zimmerman, 130 Wn. App. 170, 121 P.2d 1216 (205), review denied, 161 Wn.2d 1012 (2007); State v. Clayton, 32 Wn.2d 571, 202 P.922 (1949). In Clayton, the court upheld the giving of the non-corroboration instruction because, in giving it, the trial court never singled out or advised the jury that such uncorroborated testimony was sufficient to find guilt; and therefore, the court held, the instruction reflected the law and not the trial court's personal opinion. Clayton, 32 Wn.2d at 574.

Here, the state's case was uniquely limited to the testimony of the complaining witnesses, the alleged victims in the case. The testimony of the police officers merely confirmed that the alleged victims had made the accusations they said they had made. RP 231-234, 267-273. Their mother Kimberly Arnold confirmed only a few non-incriminating facts of her family's life. RP 207-220. None of these witnesses claimed to have any knowledge of the allegations or the alleged incidents; Keri Arnold expressly testified that she had no knowledge of any incidents or the Arnold family. RP 249-252. Under these circumstances an instruction, that to convict did

not require corroboration of the alleged victims' testimony, could be only be interpreted by jurors as an opinion that the testimony of Sarah and Caitlin was sufficient to establish guilt.

In fact, this is exactly what the prosecutor argued in closing. The prosecutor told the jurors that they were not allowed to hear what the police or other people were told, and that it all came down to whether Sarah and Caitlin were telling the truth or lying. RP 293-294. The prosecutor then told the jurors that the sisters' recollections were enough for conviction, without corroboration. RP 301. In these circumstances, the instruction that the testimony of the alleged victims did not need to be corroborated for conviction was the same as saying that Sarah and Caitlin's uncorroborated testimony was sufficient for conviction. Accordingly, the instruction was a comment on the evidence in this case.

Further, although there may be a difference, in other cases, between informing the jury that they can convict even if the alleged victim's testimony is uncorroborated and telling them that the alleged victim's uncorroborated allegations are sufficient to convict, it is a difference which is likely lost on the jurors. For this reason, the instruction does convey the trial judge's view of the sufficiency of the evidence and constitutes a judicial comment on the evidence.

The very purpose of Article 4, section 16 is "to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight or *sufficiency* of the evidence." State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (quoting State v. Jacobsen, 78 Wn.2d 491,495, 477 P.2d 1 (1970) (emphasis added). A judge comments on the evidence "if [he or she] conveys or indicates to the jury a personal opinion or view . . .regarding the credibility, weight, or sufficiency of some evidence introduced at trial." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Theroff, 95 Wn.2d 385, 3880389, 622 P.2d 1240 (1980), State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). It is sufficient to constitute a comment on the evidence if the judge's personal opinion is implied; it need not be stated expressly. Levy, at 56 Wn.2d at 721; State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). It is irrelevant whether the court intended the statement to be a comment. Lampshire, 74 Wn.2d at 893.

Because a comment on the evidence is manifest constitutional error, it can be raised for the first time on appeal. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Even if counsel does not object, as defense counsel did in this case, raising the issue on appeal is not foreclosed Lampshire, at 893. Most importantly, a comment on the evidence is presumed to be prejudicial on appeal. Levy, 156 Wn.2d at 723. (1968). The

state bears the burden of demonstrating that the defendant was not prejudiced. Id. at 723; State v. Lane, 125 Wn.2d 825, 838-839, 889 P.2d 929 (1995). The state bears the burden of showing the judge's comment did not influence the jury even if the evidence is undisputed or overwhelming. State v. Bogner, 62 Wn.2d 247, 251, 382 P.2d 254 (1963).

Here, under the facts of the case, the non-corroboration instruction should be considered a judicial comment on the evidence; it could only be construed as a statement that the testimony of Caitlin or Sarah was sufficient alone to find Mr. Arnold guilty of the charge against him. Mr. Arnold should also be held to have preserved a general challenge to the instruction which is likely in all cases to be understood by the jurors as telling them that the testimony of the alleged victim is sufficient to establish guilt. This is improper opinion under Article 4, section 16. Mr. Arnold's conviction should be reversed and remanded for retrial without the no-corroboration instruction.

4. CUMULATIVE ERROR DENIED ARNOLD A FAIR TRIAL.

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d.297 (1973); Parle v. Runnels, 505 F.3d

922 (9th Cir., 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996).

Here, the errors individually and certainly cumulatively denied Mr. Arnold a fair trial. The jurors obviously found the testimony of Sarah Arnold to be insufficiently credible to establish any of three counts where she was the alleged victim beyond a reasonable doubt; Caitlin Arnold did not describe sexual molestation in one of the counts involving her and it had to be dismissed Under these circumstances, the improper admission of expert testimony to bolster the credibility of Sarah and Caitlin, the prosecutor's improper argument that either the girls were lying or they were telling the truth, and the court's instruction that corroboration was not necessary, improperly influenced the jury's verdict on the counts for which the jury returned guilty verdicts. Mr. Arnold should, at the least, be granted a new trial based on cumulative error if not individual error.

E. REQUEST FOR RULING ON APPELLATE COSTS

The appellate court has discretion not to impose appellate costs on a defendant who is unsuccessful on appeal, pursuant to the recoupment statute, RCW 10.73.160(1). State v. Sinclair, 192 Wn. App. 380, 367 P.3 612 (2016). The court can direct that costs not be awarded in its decision terminating review. State v. Nolan, 161 Wn.2d 620, 626, 8 P.3d 300 (2007).

Costs should not be imposed where the appellant lacks the ability to pay. Sinclair, at 389-390. The fact that an order of indigency has been entered creates a presumption that indigency continues throughout the appellate review. Sinclair, at 393 (citing RAP 15.2(f)). Other non-exclusive factors relevant to the ability to pay include the age of appellant, length of sentence, other debts, family and employment history and criminal history. Sinclair, Wn. App. at 390-391.

Here, the trial court granted a Motion for Indigency allowing Mr. Arnold to appeal at public expense. See CP 187-193, 194-195. As set forth in the Motion and Judgment and Sentence, Mr. Arnold has no assets and has been sentenced to an 84-month sentence. He will remain indigent throughout and appellate costs, if imposed, would constitute a hardship given his indigency. He will file a copy of his institutional finances if helpful to this Court.

F. CONCLUSION

For all of the above reasons, Michael Arnold asks that his convictions for two counts of child molestation be reversed and remanded for retrial.

DATED this 26th day of June, 2017.

Respectfully submitted,

_____/s/_____
RITA J. GRIFFITH
Attorney for Appellant

I certify that on the 26th day of June, 2017, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following by e-mail

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